United States Court of Appeals

for the Second Circuit

REPLY BRIEF

No. 76-4100

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

SZABO FOOD SERVICES, INC., *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

On Petition for Review of Decision and Order of National Labor Relations Board

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REPLY BRIEF FOR PETITIONER

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INTRODUCTION

There exists no disagreement between the parties as to the controlling legal principles in this case:

It is agreed that the Board's unit determination must be overturned if found to be arbitrary, unreasonable and

not supported by substantial evidence. *NLRB* v. *Waterman SS Corp.*, 309 U.S. 206 (1940); *Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485 (1947); *NLRB* v. *St. John's Associates, Inc.*, 392 F.2d 182 (2d Cir. 1968); *NLRB* v. *Solis Theatre Corp.*, 403 F.2d 381 (2d Cir. 1968).

It is further agreed that the central question in determining whether a multi-unit operation should be splintered for collective bargaining purposes is whether there exists a "separate community of interest" in the proposed bargaining unit. *Wheeler-Van Label Co.* v. *NLRB*, 408 F.2d 613, 617 (2d Cir. 1969).

There is also no dispute that the existence of a separate community of interest may turn on factors such as the autonomy of local managers, administrative structure, employee interchange, history of collective bargaining, and, where relevant, geographic separation.[1] *Continental Insurance Co.* v. *NLRB*, 409 F.2d 727 (2d Cir. 1969) *cert. denied* 396 U.S. 902 (1969).

Finally, it is agreed that the Board may designate one unit, if appropriate, from among several if, in so doing, it does not give controlling weight to the extent of organization. *MPC Restaurant Corp.* v. *NLRB*, 481 F.2d 75 (2d Cir. 1973); *NLRB* v. *Metropolitan Life Insurance Co.*, 380 U.S. 438 (1965); Subsection 9(c)(5), National Labor Relations Act, 29 U.S.C. § 159(c)(5).

The parties are at issue, then, not with respect to the guiding principles but with respect to their application to the facts herein.

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[1] Since the factor of geographic separation is relevant only to the extent it would impact upon the functional integration of the overall unit, (see Employer's original brief, p. 22), the limited separation in this case is of no consequence because of the undisputed functional integration of the Employer's district-wide operations. (See *infra.*)

ARGUMENT

THE BOARD'S UNIT DETERMINATION IS ARBITRARY, UNREASONABLE AND NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

I. The Board's Departure from Precedent and Its Selective Factual Analysis

As demonstrated in the Employer's original brief, the Board's unit determination herein fails to give due consideration to all of the relevant facts and, in addition, fails to explain its departure from criteria established in other cases. For these and other reasons, the determination is unreasonable and arbitrary and must therefore be set aside. *NLRB* v. *Metropolitan Life Insurance Co., supra,* 380 U.S. 438; *NLRB* v. *Davis Cafeterias,* 358 F.2d 98 (5th Cir. 1966); *NLRB* v. *Solis Theatre Corp., supra,* 403 F.2d 381. In its brief herein, the Board fails to comment upon, much less defend, its departures from precedent and the factual oversights, misconstructions and misstatements which fundamentally taint the unit determination it made in this case.

No attempt is made, for example, to justify the Board's departure from precedent in (1) erroneously according "first and foremost" significance to the presence of an immediate supervisor at the Sikorsky cafeterias and failing to accord such significance to the district-wide commonality of interest in wages and other conditions of employment;[2] (2) erroneously concluding that the Sikorsky unit manager maintains significant day-to-day control;[3] and (3) failing to give due consideration to the disruptive effects of piecemeal unionization of an integrated district-wide operation which is governed by the terms of *one* contract providing for the performance of *one* service for *one* customer.[4]

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[2] See Employer's original brief, pp. 10-11.

[3] See Employer's original brief, pp. 11-15.

[4] See Employer's original brief, pp. 15-17.

Moreover, the Board's brief fails to address many aspects of the Company's challenge to the selective and in some respects distorted factual analysis which pervades its unit determination in this case. Thus, no explanation is proffered for (1) the Board's relying on the local manager's authority to *recommend* promotions on the one hand, while failing on the other hand to acknowledge that all promotions are *determined* on a district-wide basis by and under the personal control and scrutiny of that district manager;[5] (2) the Board's mistaken assertion that the local manager purchases food from a list approved by central management, whereas, in fact, the local manager may not purchase food but, rather, may only follow the purchasing instructions issued from corporate headquarters covering the types, quantities, prices and purveyors of food products;[6] (3) the Board's failure to fully consider the district manager's responsibility for the local administration of many detailed aspects of wage control, employee classifications, and employment benefits;[7] and (4) the Board's relying on the fact that the Sikorsky cafeterias constitute a "cost center" for record-keeping purposes, while ignoring the fact that the entire United Aircraft district is the "cost center" for operational purposes.[8]

2. No Separate Community of Interest

This Court has in *NLRB* v. *Solis Theatre Corp., supra,* 403 F.2d 381, and later in *Continental Insurance Company* v. *NLRB, supra,* 409 F.2d 727, clearly stated that the Board may not, "without substantial justification", splinter into separate bargaining units a multi-unit operation which has centrally directed and administered labor policies.

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[5] See Employer's original brief, p. 18.

[6] See Employer's original brief, p. 18.

[7] See Employer's original brief, pp. 18-19.

[8] See Employer's original brief, pp. 19-20.

The Board would justify the establishment of separate bargaining units in this case on the ground that the employees of the Sikorsky cafeterias experience a "community of interest" separate and distinct from other cafeteria employees in the United Aircraft unit. Let us examine the Board's reasoning:

a. "Autonomy" of local managers: The Board argues that the Sikorsky unit manager exercises a "substantial degree of autonomy" (Board's brief, p. 9). Under the Board's definition, the meaning of "autonomy" is stretched to new and unrecognizable limits. This is the extent of the local manager's "autonomy":

> (1) He may, using uniform company forms and after advising the district manager of the vacancy, hire replacements for entry-level jobs within an employee complement determined by the district manager.
>
> (2) He may fire employees for extreme misbehavior requiring on-the-spot action—such as physical assault.

All other employment decisions are made under the instructions or subject to approval of the district manager. It is the district manager, not the local manager, who (1) establishes uniform wages, benefits, employee classifications, and terms and conditions of employment at each of his cafeterias; (2) determines the number of employees at each location; (3) directs and controls promotions and transfers on a district-wide basis; (4) makes final determinations on layoffs; (5) finally resolves grievances; (6) coordinates and controls payroll, accounting and personnel records on a district-wide basis; and (7) controls and administers discipline.

Contrary to the Board's view, (Brief, p. 9), the cafeteria manager's ability to *recommend* that certain actions be taken is in no sense a reflection local autonomy. The very act of recommending is actually inconsistent with the concept of "autonomy" and the independence which the word

implies. To recommend is necessarily to invoke another level of judgment and decision. It is the authority to decide and to act—not to recommend or suggest— which connotes autonomy. And, except in the extremely circumscribed areas noted above, all judgmental and decision making authority resides solely with the district manager.

b. *Administrative structure:* The Board correctly emphasizes the importance of an employer's administrative structure in the designation of an appropriate bargaining unit:

> "The Board has repeatedly placed heavy reliance upon the extent of an employer's administrative decisions. (citations omitted). Indeed, the practical necessities of collective bargaining encourage having the bargaining unit accord to the administrative division. Correspondingly, when a company's organizational framework emphasizes decentralized administrative subdivisions, then these subdivisions should comprise the appropriate bargaining unit. (Board's brief, p. 10).

It is difficult to imagine a business operation with a more centralized administrative structure than the Employer's United Aircraft district. To begin with, the entire district is a single "cost center" for operational purposes. Every substantial aspect of the business operations and employment policies emanates from and is controlled by district headquarters. Thus, all menus, prices, food preparation and service, cleaning and maintenance are uniform. Food purchasing is centrally controlled; purveyors are selected by a corporate vice-president who also determines the type, quantity, and prices of all food which can be ordered by the cafeterias. Baked goods are prepared in a central kitchen in East Hartford and delivered to each location. Moreover, all material elements of the Employer's labor relations policy—wages, benefits, employee classification, working conditions, size of work force,

promotions, transfers, layoffs, grievances, discipline—are directed, controlled and implemented on an effective day-to-day basis and in a uniform fashion by the district manager.

In addition, the entire district-wide work-force is hired to perform a single service—"to put the feeding operation out" (T. 31)—for a single customer under the terms of a single contract.

Under the circumstances, "the practical necessities of collective bargaining", (Board's brief, p. 10), all militate *against* the creation of a fractured bargaining unit, with the attendant distortion of the district-wide context in which all material business and labor relations decisions are administered.

c. *Geographic separation:* The Board rationalizes its reliance on the 14 to 65 mile separation between the Sikorksy cafeterias and other locations in the district on the ground that "geographical separation . . . tends to create a separate and distinct community of interest among the employees in question." (Board's brief, p. 10). The Board fails, however, to demonstrate in what manner the minimal distances involved establish such a unique community of interest for the Sikorsky employees. Thus, for example, unlike other cases relied on by the Board,[9] no showing is, nor can be, made here of a disparity in levels of employment, wage scales, industrial conditions, cost of living or any other employment condition resulting from the geographic factors involved herein. Moreover, geographic location has no impact on operations; the functional integration of the Employer's United Aircraft district is not in dispute.[10] Geographic separation, then, can

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[9] See, for example, *NLRB* v. *Burroughs Corp.*, 261 F.2d 463, 466 (2d Cir. 1958) and *NLRB* v. *Kostel Corp.*, 440 F.2d 347, 349 (7th Cir. 1971), respectively cited in Board's brief at pp. 12, 10.

[10] See Employer's original brief, pp. 9, 22.

not logically be used to support the creation of a single location bargaining unit in this case.

d. *Interchange of Employees:* The Employer has demonstrated that the interchange in a twelve-month period of 700 employees out of a total work-force of 415 is indeed substantial and that the Board erred in finding to the contrary herein.[11] In its brief, the Board seeks to explain its finding on the ground that the employee interchange sometimes involved the staffing of special functions outside of the everyday work requirements of the Employer's employees (Board's brief, p. 11). But the use of employees at so-called "special" functions—no less than their employment at non-special functions—is a direct, inseparable and regular outgrowth of the employment relationship with the Employer. The fact that "special" work might occur at other than normal times has no perceptible bearing on the extent to which employee interchange occurs nor on any of the other factors relevant to the issue at hand. There is, then, no basis in fact or logic for the Board's effort to minimize the significance of the rate of employee interchange in the United Aircraft district.

Thus, measuring the facts of this case against each of the Board's standards, there appears no reasonable foundation for the creation of a fractionated, single location bargaining unit.

3. Cases Relied on by the Board

The Board cites a number of cases [12] to support its contention that centralized labor policies do not, by themselves, automatically prevent the establishment of a smaller

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11 See Employer's original brief, pp. 20-31.

12 *Continental Insurance Co.* v. *NLRB, supra,* 409 F.2d 727; *NLRB* v. *Burroughs Corp., supra,* 261 F.2d 463, 465-466; *Metropolitan Life Insurance Co.* v. *NLRB,* 328 F.2d 820 (3d Cir. 1964); *NLRB* v. *Western and Southern Life Insurance Co.,* 391 F.2d 119 (3d Cir. 1968) *cert. denied,* 393 U.C. 978 (1968); *Banco Credito y Ahoro Ponceno* v. *NLRB,* 390 F.2d 110 (1st Cir. 1968) *cert. denied* 393 U.S. 832 (1968). See Board's brief, pp. 12-14.

bargaining unit, a proposition with which the Employer takes no issue. The centralized labor program which covers the Employer's district operations is, however, one important factor among many other factors which makes the single unit determination in this case inappropriate. It is a factor which, under this Court's rulings in *NLRB* v. *Solis Theatre Corp., supra,* 403 F.2d 381 (2d Cir. 1968) *and Continental Insurance Co.* v. *NLRB, supra,* 409 F.2d 729, requires "substantial justification" for the splitting of a multi-unit operation into separate bargaining units—a test which, as demonstrated, is far from satisfied here.

The Board would distinguish the case of *NLRB* v. *Purity Food Stores, Inc.,* 376 F.2d 497 (1st Cir. 1967), *cert. denied,* 389 U.S. 959 (1967) on the ground that the chain of food stores in that case constituted a "small, compact, homogeneous, centralized and integrated operation", 376 F.2d at 501 (Board's brief, p. 14)—words which are equally descriptive of the Employer's United Aircraft district.

Similarly, the Board attempts to differentiate the case of *NLRB* v. *Frisch's Big Boy Ill-Mar, Inc.,* 356 F.2d 895 (7th Cir. 1966) on the basis that in that case "the decisions left to the [local restaurant] managers do not involve any significant element of judgment as to employment relations." 356 F.2d at 897 (Board's brief, p. 14). But the cafeteria managers in the instant case have no greater decision making latitude than did the local managers in *Frisch's Big Boy.* Both operated within a highly centralized organizational structure, with centrally directed and uniformly administered labor policies. The authority of the local manager in *Frisch's Big Boy* to hire employees within the hiring rates established by the district manager—authority which coextends with that accorded to cafeteria managers in this case—was viewed by the 7th Circuit as not involving significant judgment in matters of employment relations.

The Board's efforts to distinguish this case from *Purity Food* and *Frisch's Big Boy* are, then, without substance.

The Board cites *NLRB* v. *Burroughs Corp., supra,* 261 F.2d 463, 465-466 for the proposition that the Board may establish a fractionated bargaining unit in a multi-unit operation notwithstanding the existence of centralized and uniform employment policies. (Board's brief, p. 12). The Board fails to mention, however, that the *Burroughs* decision turns on several factors which readily distinguish that case from this—e.g., (1) almost total lack of employee interchange (in a period of 16 months no employees transferred out of the unit and only one employee transferred into the unit); (2) varying industrial and cost of living conditions in the broader unit sought by the employer; and (3) there existed an 18 year history of single location collective bargaining in the employer's nationwide operation.

The Board's reliance on *Metropolitan Life Insurance Co.* v. *NLRB, supra,* 328 F.2d 820 and *NLRB* v. *Western and Southern Insurance Co., supra,* 391 F.2d 119 [13] is also misplaced. In both cases, the court upheld the Board's designation of separate bargaining units in the district offices of nationwide insurance companies on the ground that the units in question were separate autonomous entities:

> " '[T]he individual district office is in effect a separate administrative entity through which the Employer conducts its business operation, and therefore, is inherently appropriate for purposes of collective bargaining.' " *Metropolitan Life Insurance Co.* v. *NLRB, supra,* 328 F.2d at 829, quoting with approval from Board's opinion, 138 NLRB 565, 567 (1962).

> "Each of the Company's district offices functions as an entirely autonomous unit vis-a-vis the other Company district offices. There is virtually no interchange of employees between the district offices, no overlap of territories, nor any other type of communication or exchange between them." *NLRB* v. *Western and Southern Life Insurance Co., supra,* 391 F.2d at 122.

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[13] Cited respectively at pp. 12, 16 Board's brief.

Thus, the insurance cases pivot on the inherently autonomous nature of the district offices. In no meaningful sense of the word, can it be said that the cafeterias involved herein operate with *any* measure of autonomy; as demonstrated, virtually every employment related business decision and every element of the business operation springs directly from district headquarters. The insurance cases, then, provide no parallel to the facts herein.

In sum, the Board has failed to present arguments or authorities which would justify its fragmentation of the Employer's cohesive, integrated district operation into individual units for collective bargaining purposes.

CONCLUSION

For the reasons hereinabove stated, the Decision and Order of the Board should be set aside.

Respectfully submitted,

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August 19, 1976

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REPLY BRIEF FOR PETITIONER

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